Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SEARIVER MARITIME, INC.,

Petitioner,

versus

BOBBY OWENS, on behalf of himself and all other employees of SeaRiver Maritime, Inc., similarly situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether federal courts, in interpreting the seaman's exemption under the Fair Labor Standards Act (29 U.S.C. §§ 207(a), 213(b)(6)), may employ a definitional standard which is different from and in conflict with the established meaning of the term under the Jones Act and the Congressional definition in other seaman legislation.

LIST OF PARTIES

1. SeaRiver Maritime, Inc.
2. Bobby Owens, on behalf of himself and all other employees of SeaRiver Maritime, Inc., similarly situated.

CORPORATE DISCLOSURE STATEMENT

SeaRiver Maritime, Inc. is a wholly owned subsidiary of SeaRiver Maritime Financial Holdings, Inc., which is a wholly owned subsidiary of Exxon Mobil Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, SeaRiver Maritime, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Fifth Circuit, entered on November 6, 2001.

CITATIONS OF REPORTS OF OPINIONS

The Fifth Circuit's decision is reported as *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698, 145 Lab.Cas. P34, 409, 7 Wage & Hour Cas.2d (BNA) 732 (5th Cir. 2001).

The district court opinion is unreported.

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment in favor of respondent and against petitioner on November 6, 2001. Petitioner timely moved for *en banc* rehearing, which was denied on December 20, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following statutes and regulations are involved in this case. These statutes and regulations are set out in the Appendix.

I. The Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. §§ 201, *et seq.*, specifically 29 U.S.C. § 207(a)(1) and § 213(b)(6). App. 24.

II. 46 U.S.C. § 713 (repealed, Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 602). App. 25.

III. The Jones Act, 46 U.S.C. § 688. App. 25.

IV. Department of Labor Regulations Regarding the Application of the FLSA to Employees Employed as Seamen, 29 CFR Part 783, *et seq.*, specifically §§ 783.31, 783.32, 786.36 and 783.37. App. 26.

STATEMENT OF THE CASE

This action involves the claim of respondent, Bobby Owens ("Owens"), as a member of a putative class of employees, against petitioner, SeaRiver Maritime, Inc. ("SeaRiver"), his former employer, claiming overtime pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* The jurisdiction of the district court was invoked under the FLSA and under 28 U.S.C. § 1331 (federal question jurisdiction).

SeaRiver owns and operates an Ocean Fleet and an Inland Fleet of vessels engaged in the marine transportation of petroleum and chemical cargoes. The Ocean Fleet consists of ocean tankers, and the Inland Fleet consists of tank barges, towboats and tugs. Owens was a SeaRiver crewmember, a licensed senior tankerman assigned to the Inland Fleet.

SeaRiver's tank barges are U.S. documented vessels inspected and approved by the Coast Guard for the transportation of petroleum and chemical products. 46 U.S.C. § 3301(10); § 3301-19; 46 CFR §§ 31.01, *et seq.* By federal law and regulation, these barges must be crewed for loading and discharge by U.S. Merchant Mariners, licensed by the U.S. Coast Guard. 46 U.S.C. § 8703; 33 CFR § 156.120; 33 CFR § 156.160.

As a SeaRiver tankerman, Owens' work aboard SeaRiver's barges and towboats included making and breaking the tows (barges secured together as a unit to comprise the "tow" of a towboat), inspection of tank barges for loading, unloading and towage, pumping water from void compartments, preventive maintenance and minor barge repairs, placement and removal of navigational, mooring and other lighting, and related services needed for vessel operations.[1]

His tankerman work also included his assignment as the U.S. Coast Guard required "person in charge" of SeaRiver tank barges responsible for their safe loading and discharge of hazardous cargoes at various refineries and terminals. This work was subject to Coast Guard boarding and inspection to ensure compliance with applicable maritime laws and regulations.[2]

SeaRiver assigned crewmembers to vessels within its Inland Fleet based upon its needs for their operation.

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[1] R.D. 33, Exhibit "1," Owens' deposition generally, pp. 35-50, 53, 81-82, 213-25, 227; Exhibit "3," Affidavit of Carmine Dulisse, pp. 26-27.

[2] *Id.*

During his employment, Owens was assigned to thirteen different towboats as well as to multiple tank barges as a crewmember of SeaRiver's Baton Rouge Strike Team. His work as a Strike Team crewmember was physically performed on SeaRiver's tank barges, but he would eat and sleep on a landing barge in Baton Rouge and was permitted to go ashore while off watch.

Owens' claims for overtime pay pertains to his Strike Team assignments on tank barges, not to his assignments on particular towboats. As a Strike Team crewmember, Owens manned and operated SeaRiver tank barges when they arrived in the Port of Baton Rouge. His work in these assignments was substantially the same as his work when assigned to towboats, i.e., making and breaking tows, fleeting and moving barges around the port, inspecting barges in preparation for towage, ballasting/deballasting of void compartments in order to achieve safe navigational drafts, performing preventive maintenance and minor repairs on the barges, placing and removing navigation, mooring and/or operational lighting, assisting SeaRiver tows in locking the barges through the nearby Port Allen locks, and all of the other usual and customary duties of SeaRiver's tankermen, including serving as the person in charge of tank barges during loading/discharge.[3]

Owens filed this action in the U.S. District Court for the Southern District of Mississippi. SeaRiver denied

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[3] R.D. 33, Exhibit "2," deposition of Carmine Dulisse, pp. 26-27, 41-49, 55, 74, 77-78; R.D. 33, Exhibit "1," Owens' deposition, pp. 126-137, 145, 157-158, 163-164, 185-187, 217-218, 235-236; R.D. 33, Exhibit "3," affidavit of Carmine Dulisse.

liability because, *inter alia*, Owens was a seaman exempt from the FLSA's overtime provisions pursuant to 29 U.S.C. § 213(b)(6). There was no dispute that Owens was a Jones Act seaman within the meaning of 46 U.S.C. § 688. The district court granted summary judgment in favor of SeaRiver, finding that Owens was a seaman within the meaning of the FLSA exemption. The court concluded that Owens' work as a Strike Team crewmember, including his duties as the person in charge of SeaRiver's tank barges, aided their operation as a means of transportation. App. 19-20.

Owens appealed, and the United States Court of Appeals for the Fifth Circuit reversed. The appellate court held that a narrower definition was applicable to the term "seaman" under the FLSA than that under the Jones Act. Utilizing this narrower definition, the court concluded that Owens' work as the person in charge was non-seaman's work which disqualified him from seaman status. *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698, 703-4 (5th Cir. 2001); App. 10-12.

ARGUMENT

Owens was employed as a U.S. Merchant Mariner, licensed by the Coast Guard and assigned by SeaRiver to be the person in charge of its Coast Guard inspected tank barges. Declining to apply the established meaning of the term "seaman," the Fifth Circuit improperly and incorrectly concluded Owens was not a "seaman" within the meaning of the FLSA exemption. SeaRiver respectfully

petitions the Court for a writ of certiorari to review the decision of the appellate court.

The issue presented herein is whether federal courts, in interpreting the seaman's exemption under the FLSA, may employ a standard which is different from and in conflict with the established meaning of the term at the time of enactment of the FLSA.

I. The FLSA Exemption.

The pertinent FLSA overtime and exemption provisions read, as follows:

> § 207. Maximum hours
>
> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

§ 213. Exemptions

(b) Maximum hour requirements

The provision of Section 207 of this title shall not apply to –

* * *

(6) any employee employed as a seaman;

29 U.S.C. § 213(b)(6).

The FLSA seaman exemption was adopted by Congress at the request of seamen, not at the request of industry.[4] There is no indication in the legislative history that any group of seamen sought to be included within the FLSA.[5] In response to their request, Congress used the broad term "seaman" in the exemption and did not differentiate among types of seamen, thus exempting all seamen. 29 U.S.C. § 213(b)(6).

By contrast, when Congress intends to limit the breadth of seaman legislation or differentiate among types or groups of seamen, Congress does so expressly by statute. *See, e.g.*, 29 U.S.C. §§ 203(p), § 213(a)(12) (the 1961

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[4] Joint Hearing before the Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st Sess., pp. 545-549, 1216-1217. See also, the Senate Report, discussing the exemption at the time of the 1961 FLSA amendments, which notes the overtime exemption is applicable to all seaman including those employed on "deep-sea vessels" and those "employed on inland waterways and on harbor craft." S.Rep. No. 145, Part IV, § D(1) (1961) reprinted in 1961 U.S.C.C.A.N. 1651.

[5] For an overview of the legislative history, see *Bolan v. Bay State Dredging Co.*, 48 F.Supp. 266, 268-269 (D. Mass. 1942).

FLSA amendments limiting the minimum wage exemption to seamen on vessels not documented or numbered under U.S. law); 46 U.S.C. § 688(b) (the 1982 amendment to the Jones Act excluding foreign seamen engaged in foreign oil field exploration from the protection of the Act); 46 U.S.C. §§ 10313, 10504, 10602 (specifying different rights and remedies for recovery of wages for different types of seamen). The FLSA, however, broadly excludes all seamen from its overtime provisions.

II. Conflict and Confusion Among the Circuits.

This Court has not addressed the definitional standard applicable to the FLSA seamen exemption. However, in *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945), this Court described the general parameters for interpreting FLSA exemptions as follows:

> The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

Id. at 493.

In the absence of a statutory definition or a dispositive ruling by this Court,[6] the lower courts have grappled with the issue, applying conflicting standards and reaching conflicting results. Most decisions acknowledge that the term "seaman" has a customary and ordinary meaning; however, the circuits are at odds as to whether that term should be interpreted in harmony with the existing statutes and jurisprudence or whether that term should be narrowly restricted to a smaller group of seamen. Compare, *e.g., Sternberg Dredging Co. v. Walling*, 158 F.2d 678, 680-682 (8th Cir. 1946); *Weaver v. Pittsburg S.S. Co.*, 153 F.2d 597, 599-601 (6th Cir., 1946), *cert. den. sub nom., Rymarkiewicz v. Pittsburg Steamship Company*, 328 U.S. 858 (1946); *Gale v. Union Bag & Paper Co.*, 116 F.2d 27, 27-8 (5th Cir. 1946), *cert. den.*, 313 U.S. 559 (1941).

The Third, Fifth and Sixth Circuits have interpreted the exemption in harmony with other federal legislation and the jurisprudence defining "seaman." *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405 (3rd Cir. 1947); *Weaver v. Pittsburg Steamship Co., supra; Gale v. Union Bag & Paper Corp., supra;* cf. *Bolan v. Bay State Dredging Co.*, 48 F.Supp. 266 (D. Mass. 1942).

These cases utilize the established meaning of the term. The Fifth and Sixth Circuits further reference Congress' existing definitions of "seaman" at the time of the

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[6] In *Icicle Foods, Inc. v. Worthington*, 475 U.S. 709 (1986), the Court considered the standard of appellate review applicable to trial court factual findings in seaman exemption cases, but the Court did not grant certiorari on the issue involving this standard.

FLSA's enactment. *Gale*, 116 F.2d at 28; *Weaver*, 153 F.2d at 600. Under this standard, the term "seaman" includes:

> every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board [any vessel belonging to any citizen of the United States] . . .

46 U.S.C. § 713 (repealed, Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 603).

These authorities also examine the jurisprudential definition of "seaman" under the Jones Act, and "masters and members of the crew of any vessel" under the Longshore and Harbor Workers' Compensation Act, as well as other federal seaman legislation, such as the Public Health Service Act[7] and Social Security Act. *Weaver*, 153 F.2d at 599-601; *Keansburg Steamboat*, 162 F.2d at 406-407; *Gale*, 116 F.2d at 27-28; *Bolan*, 48 F.Supp. at 268-271. The Fifth Circuit in *Gale* referenced the Court's decision in *Warner v. Goltra*, 293 U.S. 155 (1934), which interpreted the term "seaman" as even broader than 46 U.S.C. § 713 and held that a master of a tugboat was a seaman under the Jones Act. *Gale*, 116 F.2d at 28.

The conflicting authorities of the First, Fifth, Eighth and Ninth Circuits usually acknowledge the ordinary meaning of the term "seaman," but apply a narrower definition. *Walling v. Bay State Dredging & Contracting*

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[7] The term "seaman" under the Public Health Service Act, included "any person employed on board in the care, preservation or navigation of any vessel, or in the service on board, of those engaged in such care, preservation or navigation." 42 U.S.C. § 201(h) (repealed, Pub. L. 97-35, Title IX 986(a), Aug. 13, 1981, 95 Stat. 603).

Co., Inc., 149 F.2d 346 (1st Cir. 1945), *cert. den.*, 326 U.S. 760 (1945); *Walling v. W.D. Haden Co.*, 153 F.2d 196, 198 (5th Cir. 1946), *cert. den.*, 328 U.S. 866 (1946); *Martin v. Bedell*, 955 F.2d 1029 (5th Cir. 1992), *cert. den.*, 506 U.S. 915 (1992); *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (5th Cir. 1989);[8] *Pacific Merchant Shipping Assoc. v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), *cert. den.*, 504 U.S. 979 (1992); *Sternberg Dredging Co. v. Walling*, 158 F.2d 678 (8th Cir. 1946).

These courts decline to interpret "seaman" in harmony with other Congressional statutes or the jurisprudence defining seaman's status under the Jones Act. In the words of the First Circuit, the terms "seamen" and "members of the crew" are "flexible terms the meaning of which depends upon the circumstances in which they are used and the purposes of the particular statute in which they occur." *Bay State Dredging*, 149 F.2d at 351-352. Thus, the court concluded the term seamen "has no established meaning." *Id.*

Commentators have recognized this conflict in the circuit court decisions interpreting the seaman exemption. *Federal Procedure, Lawyers Edition*, Vol. 22A, § 52:1571; *Employment Coordinator*, Vol. 5, ¶C-11, 808 (2002).

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[8] As this review indicates, the Fifth Circuit has authored internally inconsistent jurisprudence. The Fifth Circuit panels in *W.D. Haden* and *Petroleum Treaters* applied a narrower standard, but did not cite or discuss the *Gale* decision, which had relied upon both Section 713 and jurisprudence interpreting Jones Act seaman status.

III. The Established Meaning of the Term "Seaman"

A. Rules of Statutory Construction

Courts should "giv[e] due regard to the plain meaning of statutory language and the intent of congress." *A.H. Phillips,* 324 U.S. at 493. Courts therefore construe statutes "so as to give effect to the intent of congress." *United States v. American Trucking Assn.,* 310 U.S. 534, 542 (1940).

Often the intent of Congress can be determined by the plain meaning of the words of the Act. *Id.* Unless Congress directs to the contrary, terms in legislation should be given their established meaning:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

Moskal v. United States, 498 U.S. 103, 121 (1990) (citing *Morissette v. United States,* 342 U.S. 246, 263 (1952)).

Quoting Justice Frankfurter, the *Moskal* court stated: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." *Id.* (quoting Frankfurter, J., *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947)).

B. The Established Meaning of the Term "Seaman"

While this Court has not considered the meaning of "seaman" applicable to the FLSA exemption, the issue presented herein is the one which underpins the Court's decision in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). Therein this Court examined the meaning of the undefined term "seaman" under the Jones Act. 46 U.S.C. § 688. The Court explicitly held that the term "seaman" should be accorded its "established meaning" unless Congress indicates otherwise:

> The Jones Act does not define "seaman." Neither does The Osceola, it simply uses the term as had other admiralty courts. We assume that the Jones Act uses "seaman" in the same way.
>
> * * *
>
> The Jones Act, responding directly to The Osceola, adopts without further elaboration the term used in The Osceola. Moreover, "seaman" is a maritime term of art. In the absence of contrary indication, we assume that, when a statute uses such a term, Congress intended it to have its established meaning. See Morissette v. United States, 342 U.S. 246, 263 (1952); Gilbert v. United States, 370 U.S. 650, 658 (1962). Our first task, therefore, is to determine who was a seaman under the general maritime law when Congress passed the Jones Act.

Wilander, 498 U.S. at 342.

The conflict which confronted the Court in *Wilander* was whether the term "seaman" included *only* those maritime employees who aided in the navigation of vessels.

Following a thorough review of authorities preceding and existing as of the enactment of the Jones Act in 1920 (*Wilander*, 498 U.S. at 343-346), the Court held that seaman's status under the Jones Act did not require that the worker aid in the transportation or navigation of the vessel. *Wilander*, 498 U.S. at 354-5. The Court further examined the post-enactment authorities and noted that "aid to navigation" was never a requisite element of seaman's status although some decisions occasionally alluded to "aid to navigation" in their discussion. *Wilander*, 498 U.S. at 348-353.

The Court concluded that the "key to seaman status is employment-related connection to a vessel in navigation" (*Id.* at 355) and approved the Fifth Circuit standard that the worker's duties "contribute to the function of the vessel or the accomplishment of its mission." *Id.* (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)).

IV. The Appellate Court Applied the Wrong Standard

Owens argued that while the content of his work was the same whether he was assigned as crewmember to towboats or to SeaRiver tank barges on the SeaRiver Strike Team, he was not a FLSA exempt seaman in the latter capacity because he spent "substantial" time[9] serving as the person-in-charge loading and discharging SeaRiver's tank barges.

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[9] According to the "enforcement policy" of the interpretive regulations of the Department of Labor ("DOL"), one's work is considered "substantial" if it exceeded only twenty (20%) percent of a workweek. 29 CFR § 783.37.

The district court disagreed. While recognizing that loading and discharge do not " 'necessarily' aid in the operation of [a] vessel as a means of transportation," the court concluded "from a description of Owens' duties that his loading and unloading, as well as the other duties performed in addition and incident thereto, did, in fact, aid in the operation of SeaRiver vessels as a means of transportation, even though a substantial portion of his work may have been performed on moored vessels." App. 20.

In reversing the district court, the Fifth Circuit followed its later cases that "the definition of seaman under the FLSA was narrower than that used in the Jones Act." *Owens*, 272 F.3d at 702, App. 6 (citing *W.D. Haden*, 153 F.2d at 198). The court thus held that Owens' work loading and unloading SeaRiver barges was "non-seaman work" because it did not primarily aid "in [the vessel's] actual *operation* as a means of transportation." *Id.* at 704; App. 11 (the court's emphasis).

SeaRiver respectfully submits that the court applied the wrong standard. A review of the critical facts herein compel recognition and application of the established meaning of seaman as stated in *Wilander*. Owens was a U.S. merchant mariner, licensed by the Coast Guard and assigned by SeaRiver to be the person in charge of SeaRiver tank barges. SeaRiver's barges are U.S. Coast Guard inspected tank barges approved for the transportation of hazardous cargoes. 46 U.S.C. § 3301; §§ 3701-3719. They are not uninspected vessels whose regulation is subject to the Department of Labor. *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002).

As the Coast Guard mandated person in charge, Owens was, in fact and in law, the master of these inspected vessels. While such a class of licensed mariners did not exist at the time of the enactment of the FLSA or the promulgation of the Department of Labor guidelines, these mariners are seamen and crewmembers in every sense of the word. They are charged with the responsibility for the safety and seaworthiness of their vessels, and the safe navigation of these vessels can only be achieved through proper execution of their licensed duties. The district court properly recognized the distinction between the important responsibilities of these licensed mariners and the relatively manual tasks of stevedores and longshoremen.

Wilander instructs that the term "seaman" is a term of art which should be interpreted in harmony with its established meaning at the time of the FLSA's enactment. The use of a different and narrower definition certainly creates absurd results for a multitude of seamen in the performance of the Coast Guard-licensed duties as U.S. mariners.

Further, the court incorrectly concluded that its holding comported with DOL guidelines because loading and unloading is non-seaman's work which did not primarily "aid in the actual *operation* as a means of transportation" *Owens*, 272 F.3d at 704, App. 10, 11 (citing 29 CFR § 783.31). The regulations do not direct this conclusion. The DOL regulations concerning seaman exemption are restatements of the jurisprudence interpreting the exemption, and they note that the courts are the final authority for the interpretation of the exemption. 29 CFR § 783.4. These guidelines do not mention the Jones Act, 46 U.S.C.

§ 713 or other federal seaman legislation, nor do they address whether or not the FLSA exemption should be construed in harmony with existing laws and jurisprudence. The regulations cite with approval the standards and decisions expressing contrary views. See, *e.g.*, 29 CFR § 783.29(b), endorsing the "ordinary meaning" of seaman, and §§ 783.33, 783.36, approving the *Gale* and *Keansburg Steamboat* decisions, which construed the term consistent with other laws, and also approving *Bay State Dredging* and *W.D. Haden*, which did not.

The decision erroneously assumes that under the DOL guidelines, all seamen lose their FLSA exemption whenever they spend substantial[10] time engaged in work, which is not rendered primarily in aid of transportation. However, the regulations approve the decision of *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405 (3d Cir. 1947). 29 CFR § 783.33. Therein the Third Circuit upheld the seaman's exemption for crewmembers of two passenger steamboats even though the vessels were laid up in dry dock or in winter mooring for six to seven months each year. During this interval, the vessels did not leave the dock, and approximately half the crew remained employed to perform repairs, "much of [which] work differing substantially from their duties during the navigation season." *Keansburg Steamboat*, 162 F.2d at 406. Some of the crew lived aboard, others chose to live

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[10] The regulations concerning enforcement policy suggest that twenty (20%) percent of work time is sufficient to disqualify a worker from the exemption. 29 CFR § 783.37. Obviously, under such a minimal standard for "substantial," even minor variations in a seaman's work schedule can cause a reclassification of status.

ashore. While applying a restrictive interpretation, the Third Circuit held that these crewmembers "did not lose their identity as 'Seamen' during the mooring season." *Id.* at 407. The DOL regulations approve *Keansburg Steamboat* and do not prescribe a rigid application of a "primary aid to transportation" rule.

Further the regulations recognize the exempt status of crewmembers, such as surgeons, pursers, cooks, radio operators, etc., who perform *no* "transportation" work. These crewmembers retain their exempt status as seamen during the performance of their work in connection with their vessels' operations:

> The term "seamen" includes *members of the crew* such as sailors, engineers, radio operators, firemen, *pursers, surgeons, cooks,* and stewards if, as is the usual case, their service is of the type described in § 783.31.

29 CFR § 783.32. (Emphasis added.) Their service which establishes the crewmember exemption is that which the employee:

> . . . performs, as a master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character.

29 CFR § 783.31.

Crewmembers, such as pursers, surgeons, cooks, and radio operators, perform no duties which are transportational in character; yet they are still exempt seamen. The guidelines thus direct that such crewmembers are exempt

seamen when their services are rendered to aid the operation of *their* vessels in navigation. This principle, which ties seaman's status to the crewmember's vessel-related employment, is the sum and substance of this Court's standard in *Wilander*.

While Subsection 783.32 does indicate that a worker may lose his status if he performs substantial work "not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight," such is certainly not directed to U.S. licensed mariners who serve as the persons in charge of Coast Guard inspected tank barges or tankers in the execution of their licensed duties.

V. The Impact of the Fifth Circuit Standard.

The issue presented here is not one of limited scope, affecting only SeaRiver or a few tankermen. The respondent was employed as a U.S. Merchant Mariner, licensed by the Coast Guard and assigned by SeaRiver to be the person in charge of Coast Guard inspected vessels approved for transportation of dangerous cargoes. He might have been the master, mate or other licensed officer. By law, the task of loading and discharging tankers and tank barges can only be performed by the master, mate, pilot, engineer, operator or tankerman, that is, only by those merchant mariners licensed by the Coast Guard to perform that function. 46 U.S.C. § 8703.

The Fifth Circuit rule would have a far-reaching disruptive effect upon employers and seamen alike. It would not only affect such licensed seamen, but also all other

crewmembers, such as mates, engineers, bosuns, deckhands, etc. – any seaman whose work might be classified as "non-seaman" or not rendered primarily in aid to transportation. It would likewise disqualify all surgeons, pursers, cooks, radio operators, etc., the very class of crewmembers recognized as exempt seamen under the DOL regulations.

Under the *Wilander* standard, the status of an employee as a seaman or non-seaman is determined uniformly by examining whether the worker has an employment-related connection with a vessel which contributes to the function or mission of the vessel. The employer and the worker can therefore readily determine the worker's status with a reasonable degree of both certainty and accuracy.

Under the Fifth Circuit rule, there is no certainty or consistency of the worker's status because the focus is upon the duration of particular activities, rather than the more discernible standard of the crewmember's vessel-related employment. Thus a crewmember who is an exempt seaman one week, one month or one pay-period would become a non-exempt worker the next because he or she spent substantial (as little as twenty percent) time in an activity which one court or another might conclude is "non-seaman" work.

Under the narrower rule of the Fifth Circuit, determination of status would further require an accounting as to how much of the crewmember's time and/or non-seaman's activity was spent "at sea" or "in port." *Owens*, 272 F.3d at 702, n.5; App. 8-9. There is certainly no basis for such a distinction in the FLSA.

The chameleon status under the narrower rule is evident from the court's holding in *Martin v. Bedell*, 955 F.2d at 1036. Therein the Fifth Circuit remanded the action to the district court for a determination whether the marine cooks therein spent substantial time preparing meals for oilfield workers rather than for navigational crews. Status would thus depend upon a laborious and expensive daily accounting of the activities of each seaman, which is certainly not justified in light of Congress' exemption of all seamen.

SeaRiver respectfully submits that the proper and better rule is the one articulated in *Wilander*, which allows for a uniform interpretation of seaman's status consistent with the established meaning at the time of the enactment of the FLSA.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60048

BOBBY OWENS, on behalf of himself and all other employees of SeaRiver Maritime, Inc., similarly situated,

Plaintiff-Appellant,

versus

SEARIVER MARITIME, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Nov. 6, 2001)

Before GARWOOD, PARKER and DENNIS, Circuit Judges.

GARWOOD, Circuit Judge:

In this putative class action, the plaintiff, Bobby Owens (Owens) seeks to recover damages from the defendant, SeaRiver Maritime, Inc., (SeaRiver) pursuant to the maximum hour and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. Owens appeals the district court's grant of SeaRiver's motion for summary judgment, in which that court determined that Owens was exempt from FLSA coverage because he was "employed as a seaman" under 29 U.S.C. § 213(b)(6). We

reverse the district court's summary judgment ruling that Owens is a seaman for purposes of the FLSA, and remand the case to the district court.

Facts and Proceedings Below

SeaRiver owns and operates vessels which engage in the maritime transportation of petroleum and chemical products. Owens was employed by SeaRiver as an apprentice tankerman, tankerman, and senior tankerman with SeaRiver's inland fleet from 1990 to 1998. Owens's duties varied considerably with each of these positions. As an apprentice tankerman, Owens was essentially a deckhand who performed various tasks aboard barges and towboats. As both a tankerman and senior tankerman, Owens manned barges and towboats during transportation of cargo (or "product") on inland voyages between ports as distant as Texas, Iowa, and Illinois. As a tankerman and senior tankerman, Owens also inspected barges in preparation for towing, loading, and discharging of product; monitored and adjusted the trim and draft of barges during loading and discharge; checked and handled lines connecting barges to each other and the towboat; rearranged or broke up the tow in response to weather conditions or to allow passage through locks; painted and made minor repairs to the barges; maintained barge equipment, including the engines and pumps used for loading and discharging product; and placed and removed navigation and mooring lights. Owens was also sometimes assigned as the "person in charge" of barges during the loading or discharge of product. The "person in charge" takes responsibility for

the safety and integrity of the vessel and its equipment during loading and discharge.

In 1997, Owens was assigned to SeaRiver's Baton Rouge Strike Team. It is his service in this capacity which is at issue in the present case. As a member of the Strike Team, Owens was not a member of a towboat crew and was not tied to any vessel for the duration of a voyage. The shore-based Strike Team (including Owens) was assigned to SeaRiver's stationary "landing barge." The landing barge is a former oil barge which has been removed from navigation, and is permanently moored. On this barge is a metal building containing offices, housing for the Strike Team, a workshop, and a training room. The Strike Team performed work usually done by SeaRiver towboat crews, including loading and discharge of product, but the Strike Team worked on unattended or "tramp" barges that were neither towed by SeaRiver boats nor attended by SeaRiver crews. The skills used by Owens with the Strike Team were similar to those he used when he was a towboat crewman, although Owens attended the barges only for the purposes of loading and discharging product.

Owens sued SeaRiver in a putative class action seeking to recover overtime pay and damages for himself and others pursuant to the maximum hours and overtime provisions of the FLSA. *See* 29 U.S.C. § 207(a)(1).[1] In

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[1] "Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

response, SeaRiver asserted that Owens was "employed as a seaman" and therefore exempt from the FLSA's overtime provision under 29 U.S.C. § 213(b)(6).[2] The parties filed cross-motions for summary judgment on the issue of whether Owens, while a member of the Strike Team, was "employed as a seaman" and hence exempt from the provisions of the FLSA. The district court granted SeaRiver's motion and denied that of Owens. Owens now appeals the decision of the district court.

Discussion

We review a grant of summary judgment *de novo*. *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

SeaRiver defends the district court's grant of summary judgment solely on the grounds that Owens was employed as a seaman pursuant to section 213(b)(6). Because there is no genuine dispute that SeaRiver is an "enterprise engaged in commerce," Owens was covered by the FLSA unless he was employed as a seaman. 29 U.S.C. §§ 206, 207 (providing coverage under the FLSA for persons "employed in an enterprise engaged in commerce or in the production of goods for commerce"). Only Owens's status while working on the Strike Team is

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[2] "[Section 207] shall not apply with respect to . . . any employee employed as a seaman. . . . " 29 U.S.C. § 213(b)(6).

disputed; Owens does not dispute his status as a seaman when he was a towboat crewman.

I. The "Seaman" Exception

The FLSA does not define "seaman," and the precise meaning of that term has been the subject of a series of cases in this Circuit. In *Gale v. Union Bag & Paper Co.*, 116 F.2d 27 (5th Cir. 1940), the workers in question were employed as barge tenders, and were responsible for "attending to the lines and anchors, putting out running and mooring lights, pumping out bilge water, etc." *Id.* at 27. The employees worked, ate, and slept on board their assigned barges. The Court held that the employees were indeed seamen exempted from the terms of the FLSA. The Court focused on the services the employees rendered, noting that they were "of a maritime character" and "necessary . . . to the navigation of the barges." *Id.* at 28. The Court did not articulate any distinction between the definition of "seaman" under the FLSA and the definition under the Jones Act.

Although barge tenders are seamen under the FLSA, industrial workers on dredge barges are not. In *Walling v. W.D. Haden Co.*, 153 F.2d 196 (5th Cir. 1946), the employees involved worked on barges dredging shell material from the ocean floor. Again, the Court focused on the nature of the work performed by the employees, which in this case was mostly industrial work that related to the dredging operations. Even though the workers did participate in some maritime work, the Court held that they were not seamen under the FLSA because they were "employed more in industry than in shipwork, and are

not exempt." *Id.* at 199. We also held in *W.D. Haden* that the definition of seaman under the FLSA was narrower than that used in the Jones Act. *Id.* at 198.

We revisited the distinction between the definition of seaman in the Jones Act and the FLSA in *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (5th Cir. 1989). Relying on *W.D. Haden*, the legislative history of the FLSA, and Department of Labor's regulations interpreting the Act, the Court held that "the definitions of seamen under the two acts are separate and independent of each other." *Id.* at 520.[3] According to the Court, the seaman status of a worker depended upon "the particular work performed by each employee and the relative proportion of actual seaman work as defined by the FLSA to nonseaman work." *Id.*

The most recent Fifth Circuit case to address the seaman exception is *Martin v. Bedell*, 955 F.2d 1029 (5th Cir. 1992). In *Bedell*, the Secretary of Labor brought suit to force a catering service which employed cooks on "jack-up boats" servicing offshore rigs to comply with the overtime provisions of the FLSA. We "gave great weight" to the Department of Labor's regulations interpreting the seaman exception in the FLSA, and adopted the definition of "seaman" used in those regulations:

> "The regulations state that a 'seaman' is an employee who 'performs, as a master or subject

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[3] Other Circuits have also reached the conclusion that the FLSA definition of "seaman" is narrower than the Jones Act definition. *Pacific Merchant Shipping Assn. v. Aubry*, 918 F.2d 1409, 1412 (9th Cir. 1990); *Sternberg Dredging Co. v. Walling*, 158 F.2d 678, 680-81 (8th Cir. 1947).

> to the authority, direction and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of [a] vessel as a means of transportation.' They also state that '[w]hether an employee is "employed as a seaman", within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed.' When a worker performs both seaman's work and nonseaman's work, he is a seaman unless his nonseaman's work is substantial in amount. [The Department of] Labor defines 'substantial' as work that 'occupies more than 20 percent of the time worked by the employee during the workweek.' " (footnotes omitted)

Id. at 1035-36 (citing 29 C.F.R. §§ 783.31, 783.33, 783.37 (1991)).[4] The Court then remanded the case to the district court to determine whether Blue Water's cooks spent more than twenty percent of their time preparing food for workers who were not actually engaged in the navigation of the boat on which the cooks lived and worked. According to the Court, if the cooks spent more than twenty percent of their time preparing food for non-crew workers (i.e., industrial workers on oil platforms who were not seamen) then the cooks did not fall within the definition of seaman under the FLSA.[5] *Id.*

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[4] The regulations have not changed in any presently relevant way since 1991. *See* 29 C.F.R. §§ 783.31-783.37 (2000).

[5] We agree with the *Bedell* panel's reliance on the Department of Labor's regulations, and with their use of the "twenty percent rule" in the context of that case. We are reluctant, however, to apply the twenty percent rule in a strict, mechanical fashion. An employee is "employed as a seaman"

Under the law of this Circuit, if Owens performed a substantial amount of nonseaman's work, then he cannot

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under the FLSA unless the employee performs a substantial amount of nonseaman's work. But, the amount of nonseaman's work an employee performs can vary from week to week. For instance, a member of a vessel's crew may aid with the loading and unloading of cargo when the vessel is in port. In a given week, that crew member may, *without* any change in basic assignment or position, spend more than 20 percent of his time performing nonseaman's work. This should not mean that the crew member loses his seaman status for that week, and in such a case the crew member should remain a seaman unless, as a *general* matter, a substantial portion of his time was taken up by nonseaman's work. To hold otherwise would produce an absurd result-crew members on vessels who spent the vast majority of their time at sea would, *without* any change in their basic assignment or position, lose their seaman status for the few weeks a year their vessels were in port. That would also likely be inconsistent with *Gale*. Rather than focus on a week by week analysis, the determining factors should be the general nature of the work the employee most often performs in his particular position and the primary purpose of the position the employee occupies. *Cf. Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2191-92 (1995):

> "A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. . . . On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well. . . . For example,

properly be considered a seaman for purposes of the maximum hour provisions of the FLSA.

II. Seaman's Work

While Owens had several duties as a member of the Strike Team, the most substantial portion of his working time appears to have been related to loading and unloading petroleum products from the barges. The Strike Team was created in order to facilitate the loading and unloading of unmanned and undermanned tows of barges in Baton Rouge. And, while SeaRiver's fleet manager could not estimate what amount of time a tankerman on the Strike Team would spend in actual loading or unloading, he did testify that such a tankerman "certainly spends a good percentage of his time loading and unloading, but it's very variable." Owens did not testify to the exact percentage of his time spent loading and unloading, but

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we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position."

he did indicate that when he was assigned to a barge it was for the purpose of loading or unloading that barge. Loading and discharging the barges was the primary purpose of Owens's job as a member of the Strike Team. If Owens's loading and unloading the barges as a member of the Strike Team is nonseaman's work under the FLSA, then Owens performed a substantial amount of nonseaman's work and hence cannot qualify as a seaman for purposes of the FLSA. SeaRiver in essence concedes that this is so. Clearly, it was not established as a matter of law that Owens was a seaman while a member of the Strike Team.

For purposes of the FLSA, work is seaman's work if it is "rendered primarily as an aid in the operation of [a] vessel as a means of transportation." 29 C.F.R. § 783.31. Workers who are primarily concerned with loading and unloading cargo are not, generally speaking, seamen within the meaning of the FLSA. *See* 29 C.F.R. § 783.36 (citing *McCarthy v. Wright & Cobb Lighterage Co.*, 163 F.2d 92 (2nd Cir. 1947)). The district court, however, held that it was "manifest from the descriptions of Owens' duties that his loading and unloading of cargo, as well as the other duties performed . . . did, in fact, aid in the operation of SeaRiver vessels as a means of transportation. . . . " The district court erred in holding that Owens's loading and unloading duties as a member of the Strike Team constituted seaman's work for FLSA purposes.

SeaRiver defends the district court's conclusion that Owens's loading and unloading activities were seaman's work primarily by arguing that if a barge was loaded or unloaded improperly it could not be safely moved or

towed, and could even break apart. Accordingly, SeaRiver argues, Owens' loading and unloading duties had special significance, and were in aid of the operation of the barges as a means of transportation. SeaRiver's argument assumes an extremely broad and unsupportable construction of "aid in the operation" of a "vessel as a means of transportation." Owens's loading and unloading duties related almost exclusively to removing petroleum products from the barge, not to moving or mooring the barge. Of course, the unloading and loading would have to be done in a safe or proper way, but that only *prepares* the vessel for navigation; it does not aid in its actual *operation* as a means of transportation. A rule that includes within the definition of "seaman's work" for FLSA purposes all work that prepares a vessel for navigation would include quite a few activities, most of which would not fit comfortably within a commonsense definition of "seaman's work."[6] And, SeaRiver's broad definition of "seaman's work" neglects the primary purpose of the loading and unloading – to get cargo on or off the barge. Even though Owens's loading and unloading duties were technical, specialized, and had to be done properly in order to assure proper navigation of the barge, they were still primarily cargo loading and unloading duties. While Owens's other duties may have aided in the operation of the vessel as a means of transportation, Owens's loading and unloading activities did

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[6] For example, a land-based worker who installs navigation equipment on vessels would be a seaman, as would a worker at a refueling dock-both tasks would, under SeaRiver's definition, aid in the operation of a vessel as a means of transportation to the same degree as loading or unloading cargo.

not, at least not significantly and not as their primary purpose.

Because the primary purpose of Owens's position was to accomplish nonseaman's work (loading and unloading petroleum), Owens was not a seaman under the FLSA while a member of the Strike Team.[7]

Conclusion

For the foregoing reasons, the decision of the district court granting summary judgment for SeaRiver is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED

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[7] We do not suggest that Owens, while a member of the Strike Team, was not a seaman for Jones Act purposes.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BOBBY OWENS, ON BEHALF OF HIMSELF AND ALL OTHER EMPLOYEES OF SEARIVER MARITIME, INC. SIMILARLY SITUATED — PLAINTIFF

VS. — CIVIL ACTION NO. 3:98CV694LN

SEARIVER MARITIME, INC. — DEFENDANT

MEMORANDUM OPINION AND ORDER

(Filed Dec. 10, 1999)

This cause is before the court on the motion of defendant SeaRiver Maritime, Inc. (SeaRiver) and cross-motion of plaintiff Bobby Owens for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Both parties have responded in opposition to the motions, and the court, having considered the memoranda and submissions of the parties, concludes that defendant's motion is well taken and should be granted and that plaintiff's cross-motion is not well taken and should be denied.

On October 28, 1998, Bobby Owens filed this action against SeaRiver on behalf of himself and other similarly situated employees seeking overtime compensation allegedly due under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* SeaRiver denies that Owens has a claim under the FLSA, contending that Owens was employed as a seaman and, as such, is exempt from the overtime provisions of the FLSA.

SeaRiver owns and operates a fleet of vessels engaged in the marine transportation of petroleum and chemical products. SeaRiver's fleet consists of ocean-going tankers, known as its "Ocean Fleet" and a separate fleet of tank barges, tugs and towboats, known as its "Inland Fleet." The vessels of the Inland Fleet operate between various refineries and terminals from St. Marks, Florida, to Brownville, Texas, to Chicago, Illinois, navigating the Mississippi, Illinois, Ohio, Cumberland and Tennessee Rivers, their tributaries and the Gulf Coast.

Owens was hired by SeaRiver in 1990 as an apprentice tankerman and began working as such after completing a two-week training program. Owens' assignments with SeaRiver varied, depending upon the needs and requirements for operation of SeaRiver's vessels. Over the course of his employment with SeaRiver, Owens was assigned to thirteen different towboats and tugs. As an apprentice tankerman, Owens essentially performed the duties of a deckhand, which consisted primarily of performing physical tasks aboard the barges and towboats under the immediate direction of the mate or senior tankerman. However, during most of his initial assignments, Owens would stay with the mate or senior tankerman so that he could observe the operations of the inland fleet and learn how to execute his duties in a safe and proper manner.

Having successfully completed deckhand assignments and on-the-job training with SeaRiver, Owens gained the maritime experience and competence necessary to apply for a tankerman's license. In late 1990, Owens was given formal tankerman training sponsored

by SeaRiver.[1] He thereafter applied to the U.S. Coast Guard for his tankerman's ticket, or U.S. Merchant Mariner's Document endorsed as tankerman. Owens received the ticket after satisfying the regulatory requirements of the Coast Guard and successfully completing the Coast Guard tankerman's examination.[2]

In April of 1991, Owens was promoted by SeaRiver to the position of tankerman. As a tankerman, Owens' duties included manning barges and towboats for their service in marine transportation; loading and unloading cargo; making and breaking tows (barges secured together); inspecting tank barges for loading, unloading and towage; pumping water from void compartments on the barges; performing preventive maintenance and making minor barge repairs; placing and removing navigational, mooring and other lighting; and all of the related services needed for vessel operations.

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[1] Throughout the course of Owens' employment, SeaRiver sponsored him for additional maritime training, which included Fire Fighting Training in 1993 and 1996, Maritime Confined Spaces Training in 1997 and Inland Mates' Training in 1997, as well as meetings and conferences relating to inland marine operations.

[2] By federal law and regulation, tank barges, such as those operated by SeaRiver, may be loaded and discharged only by a Coast Guard licenced U.S. Merchant Mariner, such as a tankerman. The Coast Guard specifies the requirements necessary for the licensing of tankerman, as well as operational restrictions and requirements which tankermen must observe in the performance of every load or discharge of the inspected tank barges.

Subsequently, in 1992, Owens was promoted to senior tankerman, the position he held until his resignation in 1998. As a senior tankerman, Owens' duties were generally the same as those performed as tankerman, except that, during the absence of the mate, he would direct and supervise deckhands, or apprentice tankermen, in the discharge of their duties. Then, in May of 1997, Owens became a member of the Baton Rouge Strike Team (Strike Team), which is responsible for manning and operating SeaRiver tank barges arriving in the Baton Rouge area unattended by SeaRiver towboats. The Strike Team's two principal missions are to take care of the unattended barges and to expedite tows, i.e., to get them loaded and unloaded and back out of port as quickly as possible.

As a tankerman on the Strike Team, Owens performed the same basic duties that he performed as a tankerman assigned to SeaRiver towboats, except that, as a member of the Strike Team, he worked primarily on landing barges, rather than on boats.[3] Also, on at least two occasions, Owens received assignments as the "PIC,"

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[3] Owens' specific duties, as a crewmember of the Strike Team, included making and breaking tows; fleeting and moving barges around the Baton Rouge area; inspecting barges in preparation for towage; serving as the "PIC" on SeaRiver barges during the loading and unloading of cargo; ballasting and deballasting void compartments in order to achieve safe navigational drafts and seaworthiness on the tank barge; performing preventive maintenance and minor repairs on SeaRiver barges; placing and removing navigation, mooring and/or operational lighting; assisting SeaRiver tows in locking into and out of the Port Allen locks; and all of the other usual and customary duties of SeaRiver's tankerman.

or the person responsible for the safe loading and discharge of the tank barges and for the safe and seaworthy operation and navigation of SeaRiver's vessels. Owens' work as the tankerman "PIC" was regulated by the Coast Guard and subject to Coast Guard boarding and inspection to ensure compliance with applicable maritime law and regulations.

The members of SeaRiver's Inland fleet are paid a monthly salary. Each employee works a schedule of either "2 for 1" or "1 for 1." An employee working a "2 for 1" schedule works thirty days on and then fifteen paid days off, and an employee working the "1 for 1" schedule works thirty days on and then has thirty paid days off. The monthly salary is adjusted, depending upon whether the employee's schedule is "2 for 1" or "1 for 1," but each employee of the Inland Fleet is paid his or her full salary, regardless of whether he or she was on duty or on paid leave during the salary period.

During each thirty day tour on duty or "hitch," the duty schedule or "watch" of SeaRiver deckhands and tankermen varies, depending upon their particular assignments and vessel movements. On some assignments, SeaRiver personnel stand alternate six hour watches, according to which each employee is on duty for six hours and off duty for six hours. On other assignments, the SeaRiver employees alternate twelve hour watches, pursuant to which each employee is on duty for twelve hours and off duty for twelve hours. Alternatively, the employee might be on "call watch," meaning that he or she is at rest until called for duty. Although any individual might stand two six hour watches or one

twelve hour watch in a day, he or she is not necessarily working twelve hours each day.

The question before the court is whether there is a genuine issue as to any material fact regarding whether, while performing the duties of a tankerman and a member of the Baton Rouge Strike Team, Owens was employed as a seaman and thus exempt from the overtime provisions of the FLSA. For the reasons that follow, the court concludes that while employed by SeaRiver, both as a tankerman upon towboats and as a member of the Strike Team, Owens was employed as a seaman within the meaning of the FLSA and is, therefore, exempt from the Act's overtime provisions.

Under the FLSA, subject to certain exemptions, any employee engaged in commerce who works more than forty hours a week must receive overtime compensation for any hours worked in excess of forty "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Specifically excluded from this provision, however, is "any employee employed as a seaman." 29 U.S.C. § 213(b)(6). Although the term "seaman" is not defined in the Act, "the remedial goals of the Fair Labor Standards Act lead us to read narrowly its exemptions, including the definition of 'seaman.' " *Martin v. Bedell*, 955 F.2d 1029, 1035 (5th Cir. 1992). Additionally, in determining whether an employee fits within the "seaman" exemption, the court must bear in mind that "[b]ecause employment solely on seagoing vessels does not necessarily make one a 'seaman' under the FLSA, a court must look to the actual work performed." *Id.*

In construing the "seaman" exemption, the Fifth Circuit has given "great weight" to the "consistent interpretations" of the Wage and Hour Division of the Department of Labor. *Id.* "The regulations state that a 'seaman' is an employee who 'performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of [a] vessel as a means of transportation.' " *Id.* "They also state that '[w]hether an employee is "employed as a seaman," within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed.' " *Id.* Included among seaman are "members of the crew such as sailors, engineers, radio operators, foreman, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 781.31 [of the regulations]." *Id.* at 1036 (quoting 29 C.F.R. § 783.32 (1990)). The Fifth Circuit has further instructed that "[w]hen a worker performs both seaman's work and nonseaman's work, he is a seaman unless his nonseaman's work is substantial in amount." *Id.* at 1035-36. "Substantial" has been defined as "work that 'occupies more than 20 percent of the time worked by the employee during the workweek.' " *Id.* at 1036.

Owens maintains that while he was employed as a member of the Baton Rouge Strike Team, he was not "employed as a seaman" within the contemplation of the FLSA. Owens bases such assertion on the fact that his duties, as a member of the Strike Team, consisted primarily of the loading and unloading of cargo upon a moored vessel, or other duties incident thereto. Consequently, he asserts, more than twenty percent of his time was spent

doing work that had "absolutely nothing to do with service rendered as an aid in the operation of the vessel as a means of transportation." However, while the court acknowledges that the loading and unloading of certain cargo may not necessarily "aid in the operation of [a] vessel as a means of transportation," it is manifest from the descriptions of Owens' duties that his loading and unloading of cargo, as well as the other duties performed in addition and incident thereto, did, in fact, aid in the operation of SeaRiver vessels as a means of transportation, even though a substantial portion of his work may have been performed on moored vessels. The court therefore concludes that the defendant has sustained its burden of proving that Owens was an employee employed as a seaman[4] and, accordingly, that summary judgment is appropriate.

Based on the foregoing, it is ordered that the summary judgment motion of SeaRiver Maritime, Inc. is granted and that the plaintiff's cross-motion for summary judgment is denied.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

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[4] The Fifth Circuit has held that "[a]n employer has the burden of proving that its employees stand outside of [the FLSA's] very broad protections." *Martin v. Bedell*, 955 F.2d 1029, 1035 (5th Cir. 1992).

SO ORDERED this 9th day of December, 1999.

/s/ Tom S. Lee
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60048

BOBBY OWENS, on behalf of himself and all other employees of SeaRiver Maritime, Inc, similarly situated

Plaintiff-Appellant

v.

SEARIVER MARITIME, INC

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

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ON PETITION FOR REHEARING EN BANC

(Filed Dec. 20, 2001)

(Opinion 11/6/01, 5 Cir., ___, ___ F.3d ___)

Before GARWOOD, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

Judges King, Jones, and Wiener did not participate in the consideration of the petition for rehearing en banc.

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

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29 U.S.C. § 213. Exemptions

* * *

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to –

* * *

(6) any employee employed as a seaman.;

* * *

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46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

* * *

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46 U.S.C. § 713. Definitions, schedule, and tables

In the construction of title 53 of the Revised Statutes, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"; and the term "vessel" shall be understood to comprehend every description of vessel

navigating on any sea or channel, lake or river, to which the provisions of such title may be applicable, and the term "owner" shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong.

WHO IS "EMPLOYED AS A SEAMAN"

29 C.F.R. § 783.31 Criteria for employment "as a seaman."

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels (*Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678; *Walling* v. *Haden*, 153 F. 2d 196, certiorari denied 328 U.S. 866; *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. 2d 9, certiorari denied 327 U.S. 722; *Douglas* v. *Dixie Sand and Gravel Co.*, (E.D. Tenn.) 9 WH Cases 285). The Act's provisions with respect to seamen apply to a seaman only when he is "employed as" such (*Walling* v. *Haden*, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

§ 783.32 "Seaman" includes crew members.

The term "seaman" includes members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 783.31. In some cases it may not be of that type, in which event the special provisions relating to seamen will not be applicable (*Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678; *Cuascut* v. *Standard Dredging Co.*, 94 F. Supp. 197; *Woods Lumber Co.* v. *Tobin*, 199 F. 2d 455). However, an employee employed as a seaman does not lose his status as such simply because, as an incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the beginning or end of a voyage, if the amount of such work is not substantial.

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§ 783.36 Barge Tenders.

Barge tenders on non-selfpropelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lights, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered to be employed as "seamen" for the purposes of the Act unless they do a substantial amount of "non-seaman's" work (*Gale* v. *Union Bag & Paper Corp.*, 116 F. (2d 27 (C.A. 5, 1940), cert. den. 313 U.S. 559 (1941)). However, there are employees who, while

employed on vessels such as barges and lighters, are primarily or substantially engaged in performing duties such as loading and unloading or custodial service which do not constitute service performed primarily as an aid in the operation of these vessels as a means of transportation and consequently are not employed as "seamen" (*McCarthy* v. *Wright & Cobb Lighterage Co.*, 163 F. (2d) 92; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. (2d) 971, certiorari denied 326 U.S. 722; *Woods Lumber Co.* v. *Tobin*, 20 Labor Cases 66, 640 (W.D. Tenn. 1951), aff'd, 199 F. (2d) 455). Whether an employee is on board a vessel primarily to perform maritime services as a seaman or loading and unloading services typical of such shore-bases personnel as longshoremen is a question of fact and can be determined only after reviewing all the facts in the particular case.

§ 783.37 Enforcement policy for non-seaman's work.

In the enforcement of the Act, an employee will be regarded as "employed as a seaman" if his work as a whole meets the test stated in § 783.31, even though during the workweek he performs some work of a nature other than that which characterizes the service of a seaman, if such nonseaman's work is not substantial in amount. For enforcement purposes, the Administrator's position is that such differing work is "substantial" if it occupies more than 20 percent of the time worked by the employee during the workweek.

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No. 01-1408

In The

Supreme Court of the United States

SEARIVER MARITIME, INC.,

Petitioner,

vs.

BOBBY OWENS, on behalf of himself and all other employees of SeaRiver Maritime, Inc., similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION BY THE AMERICAN WATERWAYS OPERATORS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION BY THE AMERICAN WATERWAYS OPERATORS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Applicant, the American Waterways Operators ("AWO"), moves the Court for leave to file an *amicus curiae* brief in support of Petitioner, SeaRiver Maritime, Inc. Petitioner has consented to the filing of a brief by AWO. Respondent has advised that they will not oppose a brief by AWO, but Respondent has not consented to the filing of such brief. Accordingly, Applicant seeks leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2.

NATURE OF APPLICANT'S INTEREST

AWO is the national trade association of the U.S. tugboat, towboat and barge industry. The tugboat, towboat and barge industry is a vital link in America's transportation system.

The tugboat, towboat and barge industry consists of more than 5,000 tugboats and towboats and 25,000 barges. The industry operates along 25,000 miles of U.S. inland and coastal waterways and moves more than 800 million tons of cargo each year. The tugboat, towboat and barge industry employs more than 33,000 workers aboard its vessels and generates employment for another 30,000 workers in U.S. shipyards. In addition, approximately 500,000 workers are employed in industries that rely on materials delivered by barges.

Barge movements in the United States account for twenty percent of the coal that provides energy needed

by homes and businesses. Barges also move more than thirty percent of the oil and petroleum products required each year to fuel U.S. industry and for consumer transportation. In addition, highly maneuverable tugboats assist in the safe entry of huge ocean going ships into U.S. ports, bringing much-needed energy supplies to U.S. shores.

Currently, the tugboat, towboat and barge industry comprises the largest segment (fully 85%) of the U.S.-flag fleet. Vital to the transport of equipment and supplies to theaters of battle, the U.S.-flag fleet has worked in support of U.S. military forces during every major conflict in the past century.

For over 50 years, AWO has worked to promote a greater understanding of the unique nature of the waterborne transportation industry and its contribution to the U.S. economy. It is AWO's mission to promote the long-term economic vitality of the tugboat, towboat and barge industry and to enhance the industry's ability to provide safe, efficient, and environmentally responsible transportation, through advocacy, public information, the development of responsible legislation and regulation and the establishment of safety standards. AWO acts as the principal advocate for the tugboat, towboat and barge industry in Washington, D.C. and is involved in the development of federal and state legislation and regulation. Through a unique combination of industry standards and partnership with the U.S. Coast Guard, AWO has helped lead a dramatic reduction in oil spills over the past decade.

It is the policy of AWO to participate as *amicus curiae* only when important issues of maritime law or practice are involved, and only when a court's decision may have a substantial effect on the tugboat, towboat and barge industry.

The Fifth Circuit's holding in *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001) is of major concern to AWO and its members. The *Owens* decision has the potential to impact employers and employees throughout the tugboat, towboat and barge industry. With respect to the seaman exemption from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, the *Owens* decision adds another piece to an already existing "patchwork quilt" of decisions which define "seaman." The mosaic of definitions among circuit courts presents special challenges to the tugboat, towboat and barge industry because its tugboats, towboats and barges regularly travel through the jurisdictions of various federal circuit courts.

REASONS FOR REQUESTING LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The AWO is seeking to file an *amicus curiae* brief because the decision of the court below seriously undermines the purpose of the seaman exemption from the FLSA and because the decision of the court below adds to the already confused state of law interpreting the seaman exemption. Furthermore, the decision of the court below challenges this Court's instructions for interpreting exemptions from the FLSA as articulated in *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945) and gives no deference

to this Court's jurisprudence regarding the definition of the term seaman as it relates to activities long considered to be seaman's work in the service of a vessel. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997).

The parties to this litigation will present to this Court their views regarding the seaman exemption under the FLSA based upon the facts of this case and insofar as it effects the outcome of this litigation. The focus of the parties is reasonably and naturally concerned with the ultimate outcome of their case. However, as reflected in the brief herein, the ultimate decision will affect the rules that are applied to employers and employees throughout the tugboat, towboat and barge industry.

Given AWO's tugboat, towboat and barge industry-wide perspective, AWO believes it can comment objectively about the impact of the lower court's decision on the general maritime law with respect to the seaman exemption from the FLSA. AWO's *amicus curiae* brief focuses on the effect of an overly narrow interpretation of the term "seaman" and the implications such a definition has on the seaman exemption under the FLSA. The AWO

therefore respectfully moves this Court for leave to file its *amicus curiae* brief.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Waterways Operators ("AWO") respectfully submits this brief as *amicus curiae* in support of the position of the Petitioner SeaRiver Maritime, Inc. ("SeaRiver").[1]

INTEREST OF *AMICUS CURIAE*

As recited in detail in the Nature of Applicant's Interest in the accompanying Motion, *supra*, AWO ("*Amicus*") has a strong interest in the disposition of this case. The U.S. barge and towing industry is a vital segment of America's interstate transportation system. With operations along the nation's 25,000 miles of inland and coastal waterways, including the Atlantic, Pacific, and Gulf coasts, the tugboat, towboat and barge industry is diverse in terms of geographic areas served, the types of vessels operated, the range of cargoes carried, and the types of service it provides.

As the owners and operators of commercial vessels in service under the U.S. flag, AWO members are subject to a vast array of federal statutes and regulations that govern the licensing of personnel, wages, and hours of work of the thousands of employees it supports, as well as the design, construction, equipment, manning and operation of the different types of vessels operated by AWO member companies. *See, e.g.*, 46 U.S.C. ch. 103 (protection and

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[1] Counsel for amicus curiae AWO authored this brief in its entirety. No person or entity other than AWO provided monetary support for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

relief for seamen aboard foreign and intercoastal voyages); 46 U.S.C. ch. 105 (protection and relief for seamen aboard coastwise voyages); 29 U.S.C. § 206 (minimum wage); 46 U.S.C. § 688 (seamen's remedy for personal injuries – Jones Act); 33 U.S.C. §§ 901-950 (Longshore and Harbor Workers' Compensation Act); OSHA Instruction CPL 2-1.2, Nov. 6, 1996 (OSHA/U.S. Coast Guard Authority over vessels); 46 U.S.C. ch. 37 (tank barge requirements); 46 C.F.R. pts. 30-40 (tank vessel operations requirements); 33 C.F.R. pts. 155, 156 and 157 (tank vessel oil transfer requirements); 46 C.F.R. § 15.610 (towing vessel manning standards); 46 U.S.C. §§ 7317 and 8703; 46 C.F.R. pt. 13 (standards for tankermen responsible for oil transfers to and from tank barges); 46 C.F.R. § 15.1101 (towboats which tow tank barges in coastal waters beyond the U.S. boundary line); 46 C.F.R. §§ 15.1109 and 15.1111 (requirements for crew training and limits on crew watch and rest periods).

Many of these statutes regulating various aspects of the tugboat, towboat and barge industry utilize the undefined term "seaman." The conflicting standard for defining "seaman" which exists under the Fifth Circuit's holding in *Owens v. SeaRiver Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001), especially when considered in relation to the various holdings of other circuit courts, will result in further confusion and conflict over the definition of "seaman" in future cases where the courts are called upon to define the term in the context of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* and other federal statutes.

The conflict's effect is multiplied when applied to the tugboat, towboat and barge industry because of the transitory nature of its work. Under the current patchwork quilt of circuit court decisions, in order for an employer

to determine whether an employee qualifies for the seaman exemption to the FLSA, an employer would have to conduct a different analysis of each employee on each vessel as the vessel physically travels through the jurisdiction of the various circuit courts.

SUMMARY OF THE ARGUMENT

"We have made a labryinth and got caught in it. We must find our way out." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (citing *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

The court below has adopted a definition of the term seaman which adds to the already confused state of the law interpreting the seaman exemption from the FLSA. Additionally, the court failed to give due deference to this Court's jurisprudence regarding the plain, and long established, definition of seaman. Further, the court has undermined the purpose of the seaman exemption from the FLSA and has challenged this Court's instructions for interpreting such exemptions.

A Writ of Certiorari should be granted in this case because the *Owens* decision is in conflict with the decisions of other federal circuit courts and because the court below decided an important federal question in a way that conflicts with relevant decisions by this Court. *See* Sup. Ct. R. 12.

ARGUMENT

Petitioner SeaRiver has presented the following question:

> Whether federal courts, in interpreting the seaman's exemption under the Fair Labor Standards Act (29 U.S.C. §§ 207(a), 213(b)(6)), may employ a definitional standard which is different from and in conflict with the established meaning of the term under the Jones Act and the Congressional definition in other seamen legislation.

Stated another way, the question is whether it is appropriate for lower courts to reject the plain, and long established, meaning of the term "seaman" and substitute an alternative definition for the purposes of the FLSA seaman exemption.

I. "SEAMAN" AS DEFINED BY THE U.S. SUPREME COURT

In *Wilander*, this Court discussed the doctrinal development of the term "seaman." In doing so, the Court articulated that the plain and established meaning of the term seaman included a worker whose duties "contribute to the function of the vessel or the accomplishment of its mission." 498 U.S. at 355 (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)). In 1995, this Court confirmed that, in addition to contributing to the function of a vessel or the accomplishment of its mission, a worker "must have a connection to a vessel in navigation (or to an identifiable group of such vessels), that is substantial in terms of both its duration and nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995)); *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 554 (1997)). This Court has also stated

that an employee's contribution need not aid in the navigation of the vessel. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 88 (1991). "The key to seamen status is employment-related connection to a vessel in navigation. . . . " *Id.* at 89 (citing *Wilander*, 498 U.S. at 355).

II. CONFLICT AND CONFUSION AMONG CIRCUIT COURTS

Instead of applying the plain, established meaning of seaman, as required by this Court's rules of construction for FLSA exemptions, circuit courts have created several different definitions of the term seaman. The First Circuit has stated that the term "seaman" is a flexible term, the meaning of which depends upon the circumstances in which it is used and the purpose of the particular statute in which it occurs. *Walling v. Bay State Dredging & Contracting Co.*, 149 F.2d 346, 351-52 (1st Cir. 1945). The Third Circuit has also veered off course by indicating that a seaman is an employee who signed articles and worked on an employer's vessel during the navigation period. *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405, 408 (3rd Cir. 1947). The Sixth Circuit ruled that an employee was a seaman when he:[2] (1) signed "articles", (2) ate and slept on board, and (3) was subject to discipline as a seaman and member of the crew. See *Weaver v. Pittsburgh S.S. Co.*, 153 F.2d 597, 601 (6th Cir. 1946). The Eighth Circuit stated that the term "seaman" should be given its "literal meaning as denoting one whose duties are maritime in character and rendered on a vessel in navigable waters."

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[2] AWO recognizes that many women are employed in the tugboat, towboat and barge industry. For the sake of brevity, men and women are collectively referred to as "he" in this brief.

Sternberg Dredging Co. v. Walling, 158 F.2d 678, 681 (8th Cir. 1946). The Ninth Circuit has stated that an employee is a seaman if he performs services which are "rendered primarily as an aid in the operation of a vessel as a means of transportation, provided he performs no substantial amount of work of a different character." *Worthington v. Icicle Seafoods, Inc.*, 796 F.2d 337, 338 (9th Cir. 1986) (citing 29 C.F.R. § 783.31). Finally, the Fifth Circuit has ruled that an employee who primarily engages in seaman's work is not a seaman if as little as twenty percent of his time is spent on non-seaman's work. *Owens*, 272 F.3d at 703-704; *Martin v. Bedell*, 955 F.2d 1029, 1036 (5th Cir. 1992). Thus an employee in the Fifth Circuit who spends the great majority of his work as a seaman is no longer a seaman because he has incidentally engaged in non-seaman's work. *Id.*

When examining the restrictive definitions of "seaman" that have been promulgated by various courts in connection with the seaman exemption from the FLSA, it appears from a historical perspective that the courts were influenced by a line of decisions interpreting coverage under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950.[3] *Gale v. Union Bag & Paper Corp.*, 116 F.2d 27, 28 (5th Cir. 1940); *Bolan v. Bay State Dredging & Contracting Co.*, 48 F. Supp. 266, 268-269 (Mass. Dist. Ct. 1942). The source of confusion over the differing definitions of seaman has roots in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940). *Wilander*,

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[3] *Amicus* recognizes that, in order to effectuate the LHWCA, a distinction must be drawn between land-based and non-land-based seamen's work. The reason for such distinction does not apply to the seaman's exemption of the FLSA.

498 U.S. at 349. In *Bassett*, the Court construed the extent of coverage under the LHWCA, holding that a deckhand on a lighter was not a "member of a crew" because to be such he would have had to be on board primarily to aid in the navigation. *Id.* at 349-350 (citing *Bassett*, 309 U.S. at 260). Later, in *Wilander*, the Court stated: "By the late 19th and early 20th centuries federal courts abandoned the navigation test altogether, excluding in the class of seaman those who worked on board and maintained allegiance to the ship, but who performed more specialized functions having no relation to navigation." 498 U.S. at 345.

There is no reason to apply an unnecessarily narrow definition of "seaman" that has for other statutory purposes been rejected.

The implications of an overly narrow definition of "seaman" in the maritime compensation arena are far reaching.

A. IMPACT ON SEAMAN EXEMPTION

Under the current standards being used to classify employees as seamen subject to the FLSA exemption, an employee's work or activity must aid in the navigation or transportation of the vessel. *Knudsen v. Lee & Simmons, Inc.*, 163 F.2d 95, 97 (2nd Cir. 1947); *Owens*, 272 F.2d at 701 (citing *Gale*, 116 F.2d at 28). Applying this standard, employees in any of the following positions could be subject to having their status as a seaman challenged: (1) licensed tankerman loading and unloading inland or oceangoing barges whether assigned to a particular tow or otherwise; (2) stewards; (3) maintenance personnel; (4) a chief mate on any tanker who does not stand a navigation watch, but who supervises vessel repair work while

the vessel is at sea and who supervises the loading and unloading of a vessel when in port; (5) engineers; (6) radio operators; (7) firemen; (8) pursers; (9) surgeons; (10) cooks; and (11) bartenders and croupiers on gambling or cruise vessels.

Similarly, deckhands working on large inland waterway tows, which consist of a towboat and multiple barges, may lose their seaman status because much of their work during the actual tow includes maintenance and housekeeping duties. Following the Fifth Circuit's reasoning, this type of activity might not be considered seaman's work because it does not contribute to the transportation function of the tow.

To illustrate further and to borrow an analogy from the American Trial Lawyers Association's *Amicus Brief* in *Wilander*, Ishmael of the PEQUOD (referring to Herman Melville's *Moby Dick)*, would meet the seaman's exemption from the FLSA but Queequeg, the harpooner, would not because his job did not relate to the transportation function of the whaling ship. Further, neither Queequeg or Ishmael would be considered engaged in seaman's activities under the Fifth Circuit's interpretation of the FLSA seaman's exemption while participating in the pursuit of a whale in one of the PEQUOD's whale boats.[4] While this analogy may be outdated in terms of modern day commercial marine activities, it does reflect the problems illustrated by this ever encroaching line of cases narrowly interpreting the FLSA seaman's exemption.

In *Owens*, the Fifth Circuit failed to recognize the changing nature of the marine transportation business

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[4] Both Ishmael and Queequeg might possibly qualify for the fisherman exemption from the FLSA. 29 U.S.C. § 213(a)(5).

and how those changes impact the nature of the work and duties of those employed in this highly specialized and heavily regulated industry.

> Prior to the advent of steamships, admiralty judges used navigational duties as the basis for determining who was a seaman or crewmember. When steam replaced sail as the main motive power for vessels, the duties of the laborers on the voyage changed. While seamen originally had to *'hand, reef and steer'* their vessels, the new steamships required laborers who worked with boilers, fuel, and a host of new cargoes. In *Winn*, Justice Story freed the word 'crew' from restriction to laborers with navigational duties to include the ship's company. After *Winn*, the definition of the terms crew member and seaman became based on the worker's connection to the vessel and were expanded to encompass all the officers and common workers who labored on the voyage. Justice Story's analysis 'opened the door to permit such workers as bartenders, horsemen and muletters, coopers, pursers, cooks and stewards, and a host of others to attain seaman status.' By the end of the Nineteenth Century, most admiralty judges, . . . had adopted the rule that it is the connection to the vessel that is the important issue, so that all of the 'co-laborers in the leading purpose of the voyage' had status as a seamen . . . . and rejected tests based upon a worker's navigational duties.

The Honorable John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. Mar. L. & Com. 249, 259-260 (1993). (emphasis in original) (citations omitted). Modern technology has changed the way seaman perform the everyday tasks associated with their employment. In some cases the work performed in connection with the utilization of this technology did not even exist

when the FLSA was enacted. For example, modern electronic sonar/depth sounders have replaced the task of heaving the lead line to measure the depth of water. The device makes the measurement. The person using the equipment only observes the result. Even steering a vessel is no longer performed in the same manner. Most mechanical steering has been replaced with a combination of hydraulic electrical or electronic assisted steering equipment. The equipment does the actual work of moving the vessels' rudders. The pilot or helmsman only directs the vessel's heading. Similarly, modern engines are controlled from the bridge on even the largest of ships. As a result of engine room automation, an engineer's job is now focused more on monitoring and maintenance rather than actually controlling the engines by having his hands on the throttle. Under the Fifth Circuit's definition of seaman, these ~~modern~~ day functions might not be considered seaman's work or even tasks associated with the calling. In fact, if courts continue along the current line of cases, there will be more individuals outside the exemption than covered by it even though such individuals, for any other purpose, would be considered seamen under any plain meaning given to or applied to that term. While *Wilander, Chandris, Gizoni* and *Papai* deal with the issue of seaman's status from the personal injury perspective, this Court has nevertheless recognized the ever changing roles of seamen in the context of technological changes in the tugboat, towboat and barge industry and the different types of work they perform. *Wilander,* 498 U.S. at 344-345 (discussing that general principles of maritime law must be adjusted to a changing industry).

Amicus is particularly disturbed by the criteria being used to determine which activities are seaman's duties.

Specifically, to hold that loading and unloading a vessel are not seaman's duties and that such activities have nothing to do with a vessel's general transportation function is an incorrect statement of what has been recognized in the maritime law for decades. In *Seas Shipping Co. Inc. v. Sieracki*, 328 U.S. 85, 96 (1946) this Court recognized that historically the work of loading and unloading was the work of "the ship's service, performed until recent time by members of the crew." *Id.*[5] To hold that loading and unloading is not a maritime activity because it does not contribute to the transportation function of the vessel flies in the face of this Court's statement in *Atlantic Transport* and it completely ignores the functionality and purpose for which a vessel is constructed. Commercial vessels are built to transport cargo by water, however, the proper loading and safe stowage of the cargo is not only related to the safe transport of the cargo but to the safety of the ship itself. *Id.* Improperly stowed cargo can shift during a voyage and can result in either damage to the ship or in the extreme case, loss of the vessel and its crew. Improper loading or discharge of a cargo, particularly liquid bulk cargoes, can result in severe damage to the vessel while it is being loaded, unloaded or in transit.

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[5] When addressing the contention that loading was not a maritime service and therefore not within admiralty jurisdiction, this Court commented that "[u]pon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." *Atlantic Transport Co. of W. Va. v. Imbrovek*, 234 U.S. 52, 61-62 (1914).

Amicus calls the Court's further attention to the fact that, for vessels in the bulk petroleum and chemical trades, the crews of such vessels are employed in the conduct of loading and unloading of such vessels and have been from the time these special purpose vessels entered service in the nineteenth century. This occurs without exception on board all U.S. flag tank ships and tank barges.[6] In the inland barge trades, licensed U.S. Coast Guard documented tankermen are either assigned as part of the crew of the towing vessel transporting the barges or, as in the case with Mr. Owens, they are assigned to such barges in order to load and unload them. In the instant case, a Strike Team Coordinator employed by SeaRiver was responsible for all activities connected with the loading and/or discharge of cargo. An improperly loaded or discharged barge creates a potential for the capsizing, overstressing, and breaking apart of a vessel.

B. IMPLEMENTING OVERLY NARROW STANDARD IS IMPRACTICAL

Under *Owens*, an employee is a seaman if (1) the work he is performing is characterized as seaman's work and (2) he does not spend more than twenty percent of his time on non-seaman's work. *Owens*, 272 F.3d at 702.

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[6] Any tank barge which is subject to regulations under 46 U.S.C. ch. 37 must employ a tankerman. 33 C.F.R. pt. 156. For an individual to be licensed as a tankerman he must have been issued merchant mariners documents pursuant to 46 U.S.C. § 7302 with the endorsements required under 46 U.S.C. § 7317. "Merchant mariner's documents shall be retained by the seamen to whom issued." 46 U.S.C. § 303. Thus, for the purpose of issuing merchant marine documents, the Coast Guard considers tankermen to be seamen.

Under this analysis, even when an employee is primarily engaged in seaman's work, and even though an employee is spending the vast majority of his time performing seaman's work, he will not be a seaman if his other incidental duties involve non-seaman's work.[7] Furthermore, under *Owens*, when an employer is attempting to characterize an employee's work as seaman's work or non-seaman's work, part of that analysis must include an analysis of whether the work was performed for someone who was, in turn, a seaman. *Owens*, 272 F.3d at 702 (citing *Bedell*, 955 F.2d at 1035-1036).

An impractical analysis will be required in order to show that no more than twenty percent of an employee's time is spent on non-seaman's work.[8] Even the Fifth Circuit has recognized the inherent problems in applying

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[7] In contrast, the dissent in *Papai* stated that they believe one who is involved in seaman's work seventy percent of the time is a person who "would have the status of a seaman, and both the employees and the employers would be aware of this reality about their environment." 520 U.S. at 562. (Stevens, J., dissenting.)

[8] To provide a simple illustration of the impracticality of the rule given in *Owens*, one need only imagine the following analysis for employees who are cooks and who have prepared pancakes in a galley on board a vessel. Step One: characterize the preparation of the pancakes as, generally, seamen's work and continue to the next step. Step Two: determine who ate the pancakes. Step Three: for each person who ate pancakes, determine how many of them were seamen and how many of them were not seamen. Step Four: for each of the two classes of persons who ate pancakes, (seamen and nonseamen) determine the total amount of pancakes consumed by each class. If more than twenty percent of the pancakes were consumed by non-seamen, then the cooks are not seamen. It would be impractical to expect an employer to accumulate the type of data required

a restrictive interpretation of the seaman exemption, stating "[w]e are reluctant . . . to apply the twenty percent rule in a strict, mechanical fashion. . . . [because] the amount of non-seaman's work an employee performs can vary from week to week." *Id.* at 702 n.5. The court further stated that in any given week, a

> crew member may, *without* any change in basic assignment or position, spend more than 20 percent of his time performing nonseaman's work, [but that] [t]his should not mean that the crew member loses his seaman status for that week, and in such a case–the crew member should remain a seaman unless, as a *general* matter, a substantial portion of his time was taken up by nonseaman's work. . . . Rather than focus on a week by week analysis, the determining factors should be the general nature of the work the employee most often performs in his particular position and the primary purpose of the position the employee occupies.

Id. at 703 n.5 (emphasis in original). While the Fifth Circuit has apparently recognized some of the problems associated with applying its rule, the Court makes no suggestion as to how its rules might be reconciled with a statute that requires that overtime wages be calculated on a weekly basis.

C. IMPACT ON LIEN FOR WAGES

Permitting the development of the term seaman in a manner inconsistent with the general maritime law has implications not only upon the FLSA seaman exemption, but upon other seaman-related compensation laws as

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under the current definition of "seaman" especially when some of the persons for whom an employee provides services are not employees of the given employer.

well. For example, if a person is not a seaman for purposes of the FLSA, does he lose the right to a lien for wages against any vessel to which he was assigned? *See generally*, MARTIN J. NORRIS, The Law of Seamen § 20 (4th ed. 1985) (discussing general principles of maritime liens). Certainly, the Fifth Circuit's holding in *Owens* places this issue in doubt and adds confusion to the body of the general maritime law concerning the lien for wages.

D. IMPACT ON WAGE RELATED STATUTES

In addition to the possible confusion over a seaman's lien for wages, failure to adhere to a more widely accepted definition of seaman raises doubt over who can be covered by specific statutory provisions dealing with the subject of a seaman's wages, such as the timing of payment (46 U.S.C. § 10313), garnishment rights (46 U.S.C. § 11108) and exemptions from certain state tax deductions (46 U.S.C. § 11109). None of these statutes define the term seaman, however, to be eligible for the benefits provided under these statutes, a person must be considered a seaman. *See* 46 U.S.C. §§ 10313, 11108 and 11109. Since these statutory provisions do not define the word seaman, the door is open to challenge the status of employees claiming the benefit of these provisions. There is no reason why the status of an employee could not be challenged under any of these statutory provisions upon the basis of the limited test recognized by the court in *Owens*. These problems can be avoided by following this Court's rule of statutory construction for FLSA exemptions and applying its definition of the term seaman.

III. DEFINING "SEAMAN" FOR THE PURPOSE OF THE FLSA EXEMPTION

A. THE LANGUAGE OF THE FLSA AND THE SEAMAN EXEMPTION

The overtime provisions of the FLSA generally provide that no employer shall employ any of its employees for a workweek in excess of forty hours unless such employee receives compensation of the excess hours at a rate of not less than one and one-half times his regular rate. 29 U.S.C. § 207(a)(1).

"Any employee employed as a seaman" is exempt from the overtime provisions of the FLSA. 29 U.S.C. § 213(b)(6).

B. RULES OF CONSTRUCTION FOR FLSA EXEMPTIONS

In *A.H. Phillips v. Walling*, 324 U.S. 491, 493 (1945), this Court provided explicit instructions for interpreting the exemptions delineated in the FLSA. The exemptions must be "narrowly construed, *giving due regard to the plain meaning* of statutory language and the intent of Congress." *Id.* (emphasis added). The Fifth Circuit's holding in *Owens*, like other circuit court decisions, neglects these instructions giving only a cursory nod to the "intent of Congress" and largely ignoring the "plain meaning" of the statutory language, resulting in an abuse of the interpretative process and, in turn, creating an impalpable definition of "seaman." See *Owens*, 272 F.3d at 701; *Bay State*, 149 F.2d at 351.

C. THE PLAIN MEANING OF THE TERM "SEAMAN"

In order to properly understand the breadth of an exemption, the plain meaning of the language of the statute must be identified. *A.H. Phillips*, 324 U.S. at 493. "Seaman" is a maritime term of art. *Wilander*, 498 U.S. at 342. In the absence of contrary indication, it is assumed that when a statute uses such a term, Congress intended for it to have its established meaning. *Id.* In this case, there is no indication that Congress desired a contrary meaning.[9]

This Court has long labored over the plain meaning of the term seaman and is well aware of its doctrinal development. *Papai*, 520 U.S. at 554. On at least three occasions this Court has confirmed that the plain meaning of the word seaman includes an employee: (1) whose duties contribute to the function of the vessel or to the accomplishment of its mission and (2) who has a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature. *Papai*, 520 U.S. at 554; *Gizoni*, 502 U.S. at 88; *Wilander*, 498 U.S. at 342. These decisions have provided employers and seamen alike a much needed definitional standard that gives guidance and direction in an area that, prior to these holdings, was as confused as

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[9] "The legislative history of the Act indicates a plain intention to exclude seamen from the operation of the Act. Labor organizations of seamen appeared through their representatives before the congressional Committees considering the proposed legislation. They pointed to the beneficial laws already enacted for the protection of the rights of seamen, and urged that division of jurisdiction and confusion in labor relations be avoided by excluding seamen from the operation of the provision of the bill." *Pittsburgh S.S. Co.*, 153 F.2d at 599-600.

the situation that now exists with the seaman's exemption from the FLSA.

IV. FLSA SEAMAN EXEMPTION

While the words of the FLSA overtime provision appear to be broad, Congress has reduced the reach of the overtime provision by exempting more than twenty different groups of employees. 29 U.S.C. § 213. Included among exempt employees are any workers employed as seamen. 29 U.S.C. § 213(b)(6).

The seaman exemption came at the behest of the National Maritime Union of America and representatives of other maritime groups. In fact, at the time the original bill for the FLSA was being considered, the Sailors Union of the Pacific wrote to the Committee and stated that they did not "like to see any further or additional legislation enacted to cover a group who was already so well covered. . . . " *Bay State*, 149 F.2d at 349 (citing Joint Hearing before the Senate Committee on Education and Labor and House Committee on Labor, 75th Cong., 1st Session, pp. 545, 549).[10] Thus, it was seamen themselves who requested exemption from the FLSA.

We further call to the Court's attention the fact that individuals who are employed as seamen on either ocean going or inland and coastal vessels often choose to be so employed because of the unique circumstances of their employment. For example, many individuals work thirty

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[10] Certainly, if questioned on the issue today, the representatives of seamen who testified at the Congressional hearings advocating the seaman's exemption from the FLSA would have expected all members of their various unions, regardless of the nature of the work being performed on board vessels, to have the benefit of the exemption. See generally, *Pittsburgh S.S. Co.*, 153 F.2d at 599-600.

days on and are off for thirty days. They receive compensation for both the time they are working as well as when they are off, such time being referred to as paid leave or "comp time," *Petersen v. Interocean Ships, Inc.*, 823 F.2d 1334 (9th Cir. 1987). Owens, while a member of the Sea-River Strike Team, was employed in a similar manner.

Amicus believes that it was this unique way of working that motivated the seaman's unions to request an exemption from the FLSA's coverage. *Bay State*, 149 F.2d at 349. Certainly a group of employees who specifically requested exclusion from the benefit of the overtime provision of the FLSA are not in the class of employees who were in need of the remedial protection that the FLSA was intended to supply.

V. BY DEFINING "SEAMAN" TOO NARROWLY, COURTS HAVE FRUSTRATED, RATHER THAN EFFECTUATED, LEGISLATION PROVIDING FOR A SEAMAN EXEMPTION

The FLSA is a remedial statute which "must be given a liberal construction in accordance with its obvious intent and purpose." *Bay State*, 149 F.2d at 350. However, "[k]nowing the end in view does not answer hard questions, for it does not tell us *how far* to go in pursuit of that end." *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, concurring) (citing *Rodriguez v. U.S.*, 480 U.S. 522 (1987)) (emphasis in original).

> [N]o legislation pursues its purpose at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez, 480 U.S. at 525-526 (emphasis in original).

It appears that circuit courts, while harkening to the siren song of broad coverage for remedial legislation, have veered so far off course that they have wrecked the seaman exemption upon rocky shores and rendered it useless.

CONCLUSION

Amicus recognizes that there is no Congressional mandate or judicial requirement that the definition of "seaman" be the same under the FLSA, the Jones Act, or other federal statutes. However, *Amicus* does believe that the meaning of "seaman" should not evolve into a definition that no longer has any relevance to the class of persons who follow this calling and to the actual work they perform.

Therefore, *Amicus* respectfully requests that this Court confirm that the plain and established meaning of "seaman" should be applied to the FLSA seaman exemption so that lower courts may be provided with a light that will guide them away from damaging, rocky shores and back into settled waters.

Respectfully submittted,

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